9 PERC ¶ 16060

EUREKA CITY SCHOOL DISTRICT

California Public Employment Relations Board

Eureka Teachers Association, CTA/NEA, Charging Party, v. Eureka City School District, Respondent.

Docket No. SF-CE-773

Order No. 481

January 15, 1985

Before Hesse, Chairperson; Tovar and Jaeger, Members

Unilateral Change -- Transfer Of Unit Work -- Established Practice -- 43.54, 43.521, 72.611, 72.612, 72.651 School district did not violate its duty to bargain in good faith by unilaterally assigning to nonunit aide some of work formerly performed by full-time teacher where evidence showed that work transferred was similar to work already performed by aide. Where unit and nonunit employees have overlapping duties by established practice, employer does not violate its duty to bargain merely by increasing quantity of work that nonunit employees perform and correspondingly decreasing quantity performed by unit employees.

Unilateral Change -- Reduction In Hours -- Offer Of Transfer To Full-Time Position -- 43.444, 72.611, 72.666 School district violated its duty to bargain by unilaterally reducing full-time special education position to 80 percent of full-time, thereby reducing teacher's workday by 1-1/4 hours. Although district offered teacher opportunity to transfer to full-time position at another school rather than accept reduction of hours, such offer did not excuse district from its statutory suty to provide union with notice and opportunity to negotiate over proposed reduction in hours. Fact that teacher rejected district's offer did not constitute waiver of union's right to bargain.

APPEARANCES:

Ramon E. Romero, Attorney for the Eureka Teachers Association, CTA/NEA; Hartland & Gromala by Richard A. Smith, Attorney for the Eureka City School District.

DECISION

JAEGER, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Eureka City School District (District) to a proposed decision of an Administrative Law Judge (ALJ) finding that it violated section 3543.5(a), (b), and (c) of the Educational Employment Relations Act (EERA or Act) by unilaterally transferring work out of the certificated bargaining unit.1

For the reasons set forth below, we reverse the ALJ's finding that the District unlawfully transferred work out of the bargaining unit but, nevertheless, find a violation based on determination that it unlawfully reduced the hours of an employee.

FACTS

The District's "special education" program provides assistance to students with learning disabilities and to other students who need individualized assistance. Classroom teachers who

believe a student might benefit from the special education teacher assigned to the school. That teacher tests the student, evaluates the test results, and meets with parents and with other District staff necessary. The District then determines whether to place the student in a special education program.

The special education program includes "resource specialist teachers" (RST teachers) and "designated instructional services" teachers (DIS teachers). Joyce Daugherty, a special education teacher, and Russell Shaddix, the District's coordinator of special services, both testified that the day-to-day responsibilities of RST teachers and DIS teachers are exactly the same. The only difference between and RST and DIS teacher is that an RST teacher is entitled to the assistance of an instructional aide.2

Daugherty was first employed by the District as a regular classroom teacher in 1962. Beginning in 1975, she was employed as a special education teacher at various schools. During most of the time from 1975 to 1981, Daugherty was designated a "resource specialist teacher," and had an aide assigned to assist her. During the 1981-82 school year, she was employed as a full-time DIS teacher at the Grant and Washington Elementary Schools and, consistent with the District's established policy, did not have an aide assigned to her.

The District's Decision to Reduce the Position to an Eighty Percent Position

Early in 1982, the District began to make staffing projections for its special education program for the 1982-83 school year. The District decided in late February or early March to allocate an 80 percent position (rather than a full-time position) to the Grant/Washington Schools. The decision was based on several factors, which were explained by the District's coordinator of special services, Russell Shaddix.

First, Shaddix assumed that at the end of the 1981-82 school year there would be 18-20 students in the special education program at the two schools. This assumption was based on the December count of 18 students.

Second, Shaddix knew that, as a result of the closing of two other elementary schools by the District, five or six students who were in special education programs in those schools would transfer to either Grant or Washington Schools the next year.

Third, the District knew that, typically, as students move out of the District or progress to a point where they no longer need individualized assistance, there is a drop-off rate in the program of about 25 percent from the end of one school year to the beginning of the next. Thus, the District concluded there would be approximately 20 students in the special education program at the Grant and Washington Schools in September 1982.

Based on these projections, the District decided to assign to the special education program at Grant/Washington Schools, an 80 percent RST position with a teacher's aide. On cross-examination, Shaddix acknowledged that the decision to establish an 80 percent RST position was made at the same time as the decision to assign an aide to the RST. He also testified that it would have been impossible for the District to provide the desired level of services by assigning to the Grant and Washington Schools an 80 percent DIS position without an aide. He testified that, if no aide had been assigned, the teaching position would have had been a 100 percent position.

In late March, Shaddix met with four special education teachers. Two of these (Mary Seeley and Alice Olson) were assigned to schools which were to be closed the next school year. The other two teachers, Daugherty and Gary McConkey, were the special education teachers assigned to schools at which the full-time teaching positions were to be altered.

At the meeting, Shaddix informed the teachers that two schools were to be closed and that the special education positions at the two other schools were to be altered. He told them that teachers from the closed schools would be given preference in filling special education positions at other schools and he identified the schools at which there were openings.3 The openings identified by

Shaddix were:

(1) Special day class,4 elementary (learning-handicapped)--site unknown;

(2) Resource specialist teacher--Marshall;

(3) Resource specialist teacher--Grant/Washington--80 percent assignment;

(4) Resource specialist teacher/DIS inst.--Jefferson (80 percent RST/20 percent DIS);

(5) Special day class--(severely handicapped)--Winship Junior High;

(6) Special day class--(severely emotionally disturbed)--Winship Junior High;

(7) Special day class--(learning-handicapped)--Zane Junior High;

(8) Special day class--(learning-handicapped)--Eureka High.

One of the teachers to be displaced by a school closing indicated her preference for the Marshall School position; the other indicated her preference for a junior high school position listed. It is not clear whether the third teacher present, Gary McConkey, who taught at Jefferson, stated his preference at the meeting. Shaddix testified that Daugherty could have chosen any one of the full-time positions not selected by the two teachers who had been displaced by school closings.

At the meeting, Daugherty did not indicate her choice of assignment for the ensuing year. However, several days later she wrote school Superintendent Michael McManus and applied for the 80 percent RST position at the Grant and Washington Schools.

On April 5, Shaddix met with Daugherty and the principals of the Grant and Washington Schools, Russ Bradford (at Grant) and Marty Walker (at Washington). According to a memorandum which Shaddix wrote that day describing the meeting,5 its purpose was to,

> . . . clarify the role of the resource teacher at Grant and Washington next year in light of the reduction of certificated staff time and increased student enrollment.

Four of the full-time positions were eventually filled by new employees.

Duties of Daugherty and Her Aide

As both an RST teacher and a DIS teacher, Daugherty's day-to-day responsibilities consisted of working with students several times a week either on a one-to-one basis or with small groups. She taught reading, writing, and other subjects. Some time during each week was set aside for planning programs for the students assigned to her, meeting with parents or with teachers, grading tests, or administering tests to students recently referred to the program.

During the years that Daugherty, as an RST teacher, had a teacher's aide assigned to her, the aide worked under her supervision, watching students write or read, listening to students read, preparing work for the next day, administering diagnostic examinations, and doing clerical work assigned by Daugherty. Daugherty testified that there were certain duties that she would not assign to an aide. These included evaluation of testing, conducting meetings with parents, explaining legal forms to parents, coordinating with other special education personnel, and being responsible for a child who was injured in the classroom.

While the aide did not work at a separate facility, he or she did, at times, work out of Daugherty's earshot.

As school started in September 1982, the District allocated work assignments to Daugherty and to the aide assigned to work with her, Georgine Corsetti. Daugherty worked at the Washington School from 9 a.m. to noon, and at the Grant School from 1 p.m. to 3 p.m., Mondays through Thursdays. A full-time position entailed seven and one-quarter hours per day. Corsetti worked at the Grant School from 9 a.m. to noon and at the Washington School from 1 p.m. to 2 p.m.,

Mondays through Thursdays.

Twenty students were assigned to Daugherty and Corsetti in September 1982. Half of these were at the Washington School, half were at Grant. Duagherty, who worked more hours than Corsetti, saw slightly more than 10 students; Corsetti saw slightly less than 10. Daugherty did not, as a routine matter, see any of the students with whom Corsetti worked and Corsetti did not, as a routine matter, see any of the students with whom Daugherty worked.

On Fridays, Daugherty and Corsetti were able to work together. In a September 15, 1982 memorandum sent by Shaddix to the principals of the Grant and Washington Schools, Shaddix outlined the duties Daugherty and Corsetti would be expected to perform on Fridays:

> Fridays will be devoted to planning and organizing the following week's work schedule of instructional activities. Mrs. Daugherty will be responsible for the instructional objectives and curricular planning to meet the objectives. Fridays will be used for contact with parents and agencies, meetings, teacher contacts, student assessment and completing any required paper work.
>
> It is understood that a certain amount of preparation and planning is needed before such a schedule can be effectively implemented; the first two weeks of school will be utilized in organizing the program for delivery of services.

Shaddix' description of the Friday work assignment was generally corroborated by Daugherty, who testified that, on Fridays,

> Mrs. Corsetti and I would meet and discuss our material, discuss the work the children were doing, what we wanted to do for the next week, if there were problem areas, she would inform me or I would give her things I wanted her to do and follow through. Sometimes we did testing.

At another point in the hearing, Daugherty testified that "the purpose for Friday was for my aide and I to meet together, to plan programs, for testing. . . . "

Daugherty and Corsetti did not normally communicate during the remaining four days of the week with the exception of occasional phone calls when problems arose. Corsetti testified that, from Monday through Thursday, she implemented lesson plans developed by Daugherty on Fridays. She also indicated that this was basically the same pattern of duties that she had followed in previous years, except that now she performed those duties when Daugherty was not present at the work location. When questioned closely about the difference between her duties in the fall of 1982 and in previous years, Corsetti testified that, rather then being supervised by the special education teacher, she received more supervision from the principals at the Grant and Washington Schools. She also testified that she "did a little more testing" and seemed to have more "responsibility" than in previous years.

Shaddix testified that the District's decision to arrange the Monday-Thursday split schedule for Daugherty and Corsetti--which placed them at different schools at all times, Monday through Thursday--was based on two factors. First, the District wanted to spread the "contact time" for the student and the teacher (or the aide) over four days. Second, there was limited classroom space at the Grant and Washington Schools. Apparently as a result of the closing of two elementary schools, the room which had previously been set aside for use by the special education program in at least one of the schools had become very crowded with tables and files.

The first two weeks of the new semester were set aside for organizing the program, preparation and planning. After that initial period, Daugherty and Corsetti began carrying out the schedule described above, which had been drawn up by Shaddix.

Shaddix and Marty Walker, Washington School principal and a former special education teacher, testified that it was not unusual, in special education generally, for an instructional aide, at times, to work independently of the teacher to whom she or he was assigned while remaining under the

teacher's general supervision. Indeed both Walker and Shaddix indicated that at least once in the past there had been a spilt assignment between a teacher and an aide similar to that which occurred in the fall of 1982 at the Grant and Washington Schools.

The Department of Education Investigation

In February 1983, Bruce Lindskog, on behalf of the Association, wrote to the State Department of Education, accusing the District of four misdeeds related to the special education program, including the use of aides to provide the services normally provided to students by a Resource Specialist Teacher. The Department of Education investigator concluded that by the split assignment arrangement at the Washington and Grant Schools, the District had assigned responsibilities to the teacher's aide which should have been that of the teacher (Daugherty).

The investigator concluded that the District was out of compliance with Education Code section 45344.6 His report states, in pertinent part:

> Although Education Code Section 45344 allows an aide to work " . . . beyond the physical presence of the teacher . . . ", assigning an aide a totally separate caseload at a different school site for the whole year is clearly beyond the intent of the section.
>
> A certificated staff member may not delegate "his responsibility for the instruction and supervision of the pupils in his charge" (Education Code section 45344). By assigning the aide to a removed school site to perform as the Resource Specialist would perform in delivering instruction and providing supervision, the district is requiring the Resource Specialist to delegate some of those responsibilities to another person, which Education Code section 45344 contraindicates.
>
> . . .
>
> By assigning the Resource Specialist and the aide to different school sites and to separate and distinct groups of students, the district is requiring the certificated staff member to relinquish to the aide nearly total responsibility for instruction and supervision of the pupils in her charge. . . .

There is no indication in the report itself about the manner in which the investigation was conducted. Nor was any other evidence presented on this point. Because of the uncertainty concerning the manner in which evidence was gathered, and the standards for drawing the conclusions, the ALJ concluded, and we agree, that neither the factual findings nor the conclusions are binding upon this Board in the instant case.7 The report is, however, admissible as evidence of the relationship between teachers and aides.

The Spring Semester

By the end of December 1982, the number of students in the two schools had increased from the 20 who were enrolled in September, to 24. Several more were added at the Washington School in January. By late January, the District converted the 80 percent position held by Daugherty to a full-time position. The District continued to employ a teacher's aide to assist Daugherty, although Georgine Corsetti was replaced by Beverly Thompson. The reason for this personnel change does not appear in the record.

Shaddix testified that the District decided to expand Daugherty's position to a full-time position because there had been an increase in the number of students and additional state funds for special education had become available.

The split assignments continued after Daugherty's position became full-time; it was not until mid-April that the assignments were revised so that Daugherty and her aide were working together, morning and afternoon. There is no evidence concerning the work of Daugherty's aide, Beverly

Thompson, in the period from January 31 until mid-April.

After Daugherty and her aide were reunited in April, there were times when the two worked independently, each with a different student, while in a single room.

DISCUSSION

The ALJ found that the District's conduct amounted to an unlawful transfer of work out of the certificated bargaining unit. See *Rialto Unified School District* (4/30/82) PERB Decision No. 209; *Solano County Community College District* (6/30/82) PERB Decision No. 219; *Mt. San Antonio Community College District* (8/18/83) PERB Decision No. 334. The ALJ reasoned that, because the District did not reduce the amount of special education services which it was providing at Grant/Washington but, nevertheless, reduced the Grant/Washington special education teaching position from 100 per cent to 80 percent and transferred some teaching functions to a certificated aide, the District had acted unlawfully.

The District excepts to this determination, asserting that it did not transfer teacher work to aides but simply assigned to Corsetti more duties of the sort which she had previously performed.

In *Rialto Unified School District, supra,* the Board held that the decision to transfer work from bargaining unit to nonbargaining unit employees is negotiable so long as the transfer impacts upon a subject within the scope of representation. *Solano County Community College District, supra; Goleta Union School District* (8/1/84) PERB Decision No. 391.

We find that, in this case, the Association has failed to prove that the District unlawfully transferred work out of the certificated unit. In our view, in order to prevail on a unilateral transfer of work theory, the charging party must establish, as a threshold matter, that duties were, in fact, transferred out of the unit; that is, that unit employees ceased to perform work which they had previously performed or that nonunit employees began to perform duties previously performed *exclusively* by unit employees. However, where, as here, unit and nonunit employees have traditionally had overlapping duties, an employer does not violate its duty to negotiate in good faith merely by increasing the quantity of work which nonunit employees perform and decreasing the quantity of work which unit employees perform.8

There is no evidence that Daugherty ceased to perform duties which had previously been assigned to her in the past. Her teaching duties in the fall of 1982 were no different from her duties in previous years--except that she now had day-to-day contact with fewer students. Similarly, the record establishes that Corsetti's duties in the fall of 1982 were indistinguishable from those which she had performed in the past. The only difference between her assignment in the fall of 1982 and in previous years was that she now performed her duties at a different work site than her supervising teacher, Daugherty, and thus spent more time in direct contact with students. Repeatedly, however, when questioned as to whether Corsetti had been assigned duties which, in the past, had been or lawfully could have been performed only by teachers, Daugherty answered in the negative.9 Hence, we conclude that the evidence establishes no more than the fact that, in the fall of 1982, Corsetti was assigned to perform more work of the sort which she had previously performed.

We do, however, find that the District's conduct herein constituted an unlawful unilateral reduction in Daugherty's hours of employment.10 The Board has long held that both the decision to reduce hours of employment and the effects of that decision are negotiable and that management may not unilaterally reduce hours without affording the exclusive representative notice and an opportunity to negotiate. *North Sacramento School District* (12/31/81) PERB Decision No. 193; *Pittsburgh Unified School District* (6/10/83) PERB Decision No. 318; *Oakland Unified School District* (12/16/83) PERB Decision No. 367; *Azusa Unified School District* (12/30/83) PERB Decision No. 374; *Healdsburg Union High School District/San Mateo City School District* (1/5/84) PERB Decision No. 375.11 Here, it is undisputed that, without providing notice and an opportunity to negotiate to the Association, the District approached

Daugherty in the spring of 1982 and indicated to her that her special education position at the Grant/Washington Schools was going to be reduced from full time to 80 percent, thus decreasing her hours of employment from seven and one-quarter to six hours per day. Absent a valid defense, such conduct would violate the District's obligation not to make unilateral reductions in hours of employment.

By way of defense, the District contends that Daugherty's hours were not reduced, since she was offered a full-time position in another school and she "voluntarily" accepted the 80 percent Grant/Washington position. In *Oakland Unified School District, supra,* the Board expressly rejected this very argument. In that case, a school district employed instructional aides who worked a variety of hours, ranging from two to six hours per day. As part of a newly instituted standardization of hours policy, the District notified certain employees in the spring of 1980, that, for the 1980-81 school year, their hours of employment would be reduced. However, it indicated to the affected employees that, if they desired to retain their former hours, they could transfer to another work location. Before the Board, the employer contended that, because employees could transfer to other positions, it had reduced the hours of "positions" rather than the hours of "employees." The Board rejected this contention, reasoning that, since the positions were occupied by incumbent employees, the District's argument could be characterized as "a distinction without a difference." *Oakland Unified School District, supra,* at p. 32.

In this case, it is undisputed that the Grant/Washington position was occupied by an incumbent employee, Joyce Daugherty, when the District made the unilateral determination to reduce her hours of employment. While the District may have offered her the opportunity to transfer rather than suffer a reduction in hours, such an offer does not excuse the District from its legal obligation to provide to the exclusive representative notice and an opportunity to negotiate the proposed reduction in hours.12 In sum, as we stated in *Oakland,* the District's argument that it reduced the hours of the Grant/Washington "position"--as opposed to those of the employee occupying that position--is a distinction without a difference.

Accordingly, we find that the District violated its duty to negotiate in good faith by unilaterally reducing the hours of employment of Joyce Daugherty without offering the Association notice and the opportunity to negotiate in good faith.

We note that our dissenting colleague argues that the decision to reduce Daugherty's hours was nonnegotiable because it was motivated by a desire to alter the level of service provided. In the first place, there is no evidence in this case that management altered the level of special education services it intended to provide. On the contrary, the level of services remained unchanged after the unilateral change--only the identity of employees providing that service was altered. Secondly, while we agree that, generally speaking, the decision to reduce services is a managerial prerogative, that does not automatically render any and all *means* chosen to carry out such a reduction lawful or remove an entire subject of bargaining from the scope of representation. Under our dissenting colleague's approach, management is free to alter employees' terms and conditions of employment in any way it sees fit, so long as its motivation is tied to a "managerial prerogative." Were this the case, management could unilaterally double employees hours of employment because it intended to increase the level of services which it offered to the public. Or, perhaps, management would be free to reduce wages at any time because "budget allocations" are within management's exclusive prerogative. Such a view undermines the very purpose of a collective bargaining statute such as EERA. Finally, we note that the Dissent suggests that the District did not violate its duty to negotiate in good faith because Daugherty "voluntarily" chose to remain in the reduced position rather than transfer to a full-time position at another school and that, therefore, the District's actions had no "effect" on Daugherty's terms and conditions of employment. In response to this position, we can only remind our dissenting colleague that the District's offer of an "alternative" *of its own construction*--however much motivated by good faith--does not relieve the District of its duty to negotiate in good faith.

REMEDY

Section 3541.5(c) grants the Board broad authority to fashion remedies which will effectuate the policies of the Act. In this case, it has been found that the District unilaterally reduced Joyce Daugherty's hours of employment without affording the Association notice and an opportunity to negotiate. Normally, in such a circumstance, it would be appropriate to order the District to restore the status quo *ante.* However, the record reflects that in the spring semester of 1983, the District restored the Grant/Washington special education position to its former full-time status. Therefore, it is unnecessary for the Board to order a restoration of the hours. However, we shall order the District to cease and desist from making unlawful unilateral changes and to make Joyce Daugherty whole for any financial losses she suffered as a result of the District's unlawful conduct. We shall also order the District to post the customary notice to employees.

The District's request for oral argument is denied.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case and pursuant to section 3541.5(c), it is found that the Eureka City School District violated Government Code section 3543.5(a), (b), and (c).

It is hereby ORDERED that the Eureka City School District, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Interfering with Joyce Daugherty's exercise of rights guaranteed by the Educational Employment Relations Act by unilaterally reducing her hours of employment without negotiating in good faith;

2. Denying the Eureka Teachers Association, CTA/NEA rights guaranteed to it by the Educational Employment Relations Act by unilaterally reducing Joyce Daugherty's hours of employment without negotiating in good faith; and

3. Failing and refusing to meet and negotiate in good faith with the exclusive representative by unilaterally reducing Joyce Daugherty's hours of employment.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

1. Make Joyce Daugherty whole for any loss in compensation she suffered as a result of the District's unlawful reduction in her hours. Such payment shall include interest at a rate of 10 percent per annum.

2. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all work locations where notices to employees are customarily placed, copies of the Notice to Employees attached as an appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for a least thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the notice is not reduced in size, defaced, altered or covered by any material.

3. Written notification of the actions taken to comply with this Order shall be made to the regional director of the Public Employment Relations Board in accordance with his/her instructions.

Member Tovar joined in this Decision.

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1 The EERA is codified at Government Code section 3540 et seq. All references are to the Government Code unless otherwise indicated.

Section 3543.5 provides, in relevant part:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

2 There was no evidence introduced at the hearing as to the source of this distinction, but it is not disputed that such a distinction exists.

3 On March 18, 1982, the District and the Eureka Teachers Association (Association) had signed an agreement setting out "guidelines" for the transfer of personnel resulting from school closings. One aspect of this agreement gave teachers from closed schools preference for openings sought by two or more qualified applicants. There is no evidence that this agreement was intended to cover the reassignment rights of teachers like Daugherty and McConkey whose schools had not been closed, but who, nevertheless, suffered a reduction in the hours of their positions.

4 The phrase was not clearly defined during the hearing.

5 Although the memorandum does not identify Daugherty as the teacher to be assigned to the schools the next year, it may be inferred from the circumstances that the participants in the meeting assumed that Daugherty would have the job. In any event, on April 28, 1982, Superintendent McManus sent a letter to Daugherty informing her she had been assigned to the 80 percent Grant/Washington position.

6 Education Code section 45344 provides, in relevant part:

> An instructional aide shall perform only such duties as, in the judgment of the certificated personnel to whom the instructional aide is assigned, may be performed by a person not licensed as a classroom teacher. These duties shall not include assignment of grades to pupils. An instructional aide need not perform such duties in the physical presence of the teacher but the teacher shall retain his responsibility for the instruction and supervision of the pupils in his charge.

7 See *Overnite Transportation Company* (1966) 157 NLRB 1185 [61 LRRM 1520]; *Yellow Cab, Inc.* (1969) 179 NLRB No. 148 [72 LRRM 1514].

8 Thus, in a case such as this, in order to establish a prima facie violation of the Act based on an unlawful transfer of unit work theory, the Association should have filed its charge at the time that nonunit employees *first began performing unit work,* not long after such a practice became established.

9 We are aware that the investigator from the Department of Education reached a contrary conclusion based on his investigation of the District's conduct and, indeed, found that the District was not in compliance with Education Code section 45344, *supra.* For several reasons, however, we find that the investigator's conclusions are insufficient to convince us to depart from our determination that the District did not transfer work from the certificated unit. First, as noted above, from the fact of the Department of Education report, it is probable that its investigatory procedures do not involve a formal hearing and thus provide no due process protections in the gathering of evidence. Second,

it is unclear upon what evidence the investigator based his determination that the District violated the Education Code. Perhaps such a conclusion was based on different evidence than that presented in the record before us. Finally, we note that this Board is not charged with enforcing the Education Code and, while the District may have violated the Education Code, such a determination must be made in another forum.

10 At the hearing, the Association moved to amend its complaint to allege that, as well as transferring work out of the bargaining unit, the District unlawfully reduced Joyce Daugherty's hours of employment. The District objected to this amendment as being untimely. In his proposed decision, the ALJ found that, irrespective of whether the amendment was timely, the issue could be adjudicated by the Board as an unalleged violation since it had been fully litigated, was related to the subject matter of the charge, and the parties had the opportunity to examine and be cross-examined on the issue. *Santa Clara Unified School District* (9/26/79) PERB Decision No. 104. We agree with the ALJ that the reduction of hours issue falls within the *Santa Clara* test. Accordingly, we need not reach the question of whether the amendment at the hearing was timely filed.

11 Negotiations over reduction in hours are to be distinguished from those concerning layoffs. Thus, unlike the right to negotiate reductions in hours, the Board has held that the right to negotiate the decision to lay off is superseded by specific provisions of the Education Code. See section 3540; *Newman-Crows Landing Unified School District* (6/30/82) PERB Decision No. 223 (classified employees); *Mt. Diablo Unified School District* (12/30/83) PERB Decision No. 373 (certificated employees). The effects of a layoff decision are, of course, always negotiable.

12 We note that the subject of transfers is within the scope of representation. At the time of this case, Article 21.5 of the parties' collective agreement provided:

> The District, following an assessment of its educationally related needs, shall administratively transfer teachers to positions to meet needs considering credentials, major and minor, enrollment changes leading to staff imbalances, or any specialized lay and/or teaching experience to perform the required services.

There was no evidence at the hearing as to the meaning of Article 21.5 or the application of that provision to the facts of this case. It is clear, however, that the District never attempted to transfer Daugherty involuntarily to another position.

HESSE, Chairperson, concurring and dissenting: Although I concur with my colleagues that the District did not unilaterally transfer work from the bargaining unit, I respectfully dissent from that portion of the Decision that finds a violation of Government Code section 3543.5(c) based upon the District's alleged reduction of hours of employee Joyce Daugherty. The majority holds that Daugherty's hours were reduced unilaterally from 100 percent to 80 percent. As Daugherty was given the option of taking one of several other full-time positions, I must disagree that the District was guilty of reducing her hours.

This Board, in a number of decisions, has held that the level of service to be provided by an employer is not a negotiable subject of bargaining. (See, e.g., *Mt. San Antonio Community College District* (3/24/83) PERB Decision No. 297 at p.3; *Davis Joint Unified School District* (8/2/84) PERB Decision No. 393 at pp. 26-27.) Ergo, the decision by the District was to reduce the level of certificated services at the Grant/Washington Schools by 20 percent, and it was not a negotiable decision.1

Having found that there was a decision to reduce the level of certificated service, I must disagree with the majority that there was a concomitant decision to reduce Daugherty's hours. The majority holds, relying upon *Oakland Unified School District* (12/16/83) PERB Decision No.

367, that the decision to reduce the hours of the position (or the level of service), vis-a-vis the decision to reduce the hours of a particular employee is "a distinction without a difference." (Majority opinion, p. 20.) I cannot agree. Here Daugherty was given the option of a full-time position at several other schools for which she was credentialed and qualified. The District was under no obligation to "recreate" for her a full-time position at Grant/Washington merely because she preferred to stay at those schools. There is no indication that a transfer would have placed Daugherty in a school far removed from her home, and resulting in a long commute, or that a transfer would place her in a school with a dramatically different student composition than she was qualified to teach. The plain truth of the matter is that the employer, recognizing its obligation to Daugherty and the other special education teachers, offered a position that would have resulted in no loss of pay. Daugherty rejected this option for unknown reasons, but that rejection did not give birth to an obligation by the District to keep her position at Grant/Washington open for her at 100 percent.2

I recognize that this Board has held, on several occasions, that the decision to reduce the hours of work is negotiable. But I am not willing to rule that *all* reductions in hours, especially those that are the *result* of a purely managerial decision, are negotiable, even if the effects of the decision are negotiable.3 This is especially true when the employer presents to an affected employee a reasonable alternative that would provide the employee with working conditions nearly identical to her former situation. Thus, even though management may have to negotiate the effects of any particular decision to reduce services that result in a reduction of hours, I would find here that the "effect" on Daugherty's hours were self-induced. That is, but for the fact that Daugherty chose to remain at Grant/Washington, there would have been no effects of the decision to reduce services over which the employer had to bargain.

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1 That the aide was capable, and arguably authorized, to perform many of the same services is irrelevant. The aide is an adjunct of a certificated person, and the latter's time with the students was reduced.

2 Ironically, the District probably had the authority to transfer Daugherty, unilaterally and involuntarily, under the collective bargaining agreement. I cannot condone the finding of a violation of EERA when the employer, seeking to mitigate an employee's unhappiness at being legitimately transferred, permits the employee to choose an alternate assignment that involves a reduction in hours due to the decision to reduce services.

3 I find no evidence in this record to support any of the scenarios envisioned by the majority at p. 21. Not only was the decision to reduce services, and consequently hours of the position, a legitimate managerial decision under our case law, as applied to the specific facts of this case, as the majority notes, the contract specifically permitted the decision to be made by management.